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**7535-01-U**

## **NATIONAL CREDIT UNION ADMINISTRATION**

### **12 CFR Part 709**

#### **Involuntary Liquidation of Federal Credit Unions and Adjudication of Creditor Claims Involving Federally Insured Credit Unions in Liquidation**

**AGENCY:** National Credit Union Administration.

**ACTION:** Final rule.

**SUMMARY:** The National Credit Union Administration (NCUA) is issuing a final rule amending its involuntary liquidation regulation to designate swap agreements (swaps) as qualified financial contracts (QFCs).

**EFFECTIVE DATE:** This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

**FOR FURTHER INFORMATION CONTACT:** Paul Peterson, Staff Attorney, Office of General Counsel, at the above address or telephone: (703) 518-6555.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On February 20, 2003, NCUA issued a proposed rule that would add §709.13 to NCUA's involuntary liquidation regulation to designate swaps as QFCs. 68 FR 8860, February 26, 2003; 12 CFR part 709.

As discussed in the preamble to the proposed rule, §207 of the Federal Credit Union Act (FCU Act) contains provisions concerning the treatment of QFCs in liquidation or conservatorship. 12 U.S.C. 1787(c)(3), (8). Generally, these QFC provisions enable a QFC counterparty to exercise its contractual rights to terminate and net QFCs and protect itself against the selective assumption of QFCs by a liquidating agent or conservator. QFC treatment limits counterparty exposure and preserves market stability when a credit union with QFCs enters liquidation or conservatorship.

Section 207 of the FCU Act also provides that "the term 'qualified financial contract' means any securities contract, forward contract, repurchase agreement, and any similar agreement that the [NCUA] Board determines by regulation to be a qualified financial

contract for purposes of this paragraph.” 12 U.S.C. 1787(c)(8)(D)(i). The Board has determined that swaps are similar to those agreements enumerated in the FCU Act’s definition and should be recognized as QFCs. See H.R. Rep. No. 101-484 at 1 (recognizing that swaps are “similar” to forward contracts, securities contracts, and repurchase agreements), to accompany P.L. 101-311 (Bankruptcy: Swap Agreements and Forward Contracts), reprinted in 1990 U.S.C.C.A.N. 223. This Board determination that swaps receive QFC treatment will provide greater certainty about the treatment of swaps if a federally-insured credit union is placed into involuntary liquidation or a conservatorship and will encourage counterparties to engage in swaps with credit unions. This final rule also parallels the Federal Deposit Insurance Act’s treatment of swaps involving banks. 12 U.S.C. 1821(e)(8)(D)(i), (vi), (vii).

As stated in the preamble to the proposed rule, the Board has determined that it will exercise its discretion as liquidating agent or conservator and provide swaps with QFC treatment if there is a liquidation or conservatorship involving swaps before this final rule is effective.

## **B. Comments**

The Board received thirteen comment letters on the proposed rule: five from corporate credit unions, three from natural person credit unions, and five from credit union trade organizations.

All thirteen commenters expressed support for designating swaps as QFCs. Nine of the thirteen commenters recommended that the language of the proposed rule be amended to clarify that any master agreement involving swaps will be treated as a swap. The Board agrees with this recommended clarification and has added language to the final rule paralleling a similar provision in the Federal Deposit Insurance Act. 12 U.S.C. 1821(e)(8)(D)(vii).

One commenter asked that the new rule state explicitly that any conservator or liquidating agent of a credit union would be obligated to recognize all of the rights of QFC counterparties set out in §207(c)(8)(A) of the FCU Act. 12 U.S.C. 1787(c)(8)(A). This commenter believes §207(c)(8)(A) of the FCU Act contains an erroneous cross-reference to §207(c)(12) of the FCU Act and that adoption of the commenter's proposed language would cure this error. 12 U.S.C. 1787(c)(12). The Board agrees that this cross-reference to §207(c)(12) is erroneous. The correct cross-reference should be to §207(c)(10), as indicated by comparison with parallel provisions in the Federal Deposit Insurance Act. 12 U.S.C. 1787(c)(8)(A) and 1821(e)(8)(A). Although the Board cannot issue a regulation for purposes of correcting a statute, the Board will limit its discretion when acting as a liquidating agent or conservator to allow counterparties to exercise their rights under §207(c)(8)(A) as if that section contained a cross-reference to §207(c)(10), not §207(c)(12). The Board also notes the House of Representatives recently approved a bill that would, if enacted into law, correct this error. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, Title IX (Toomey Amendment).

Another commenter asked that the Board also designate commodity contracts as QFCs. The proposed rule did not address commodity contracts, and, therefore, they are beyond the scope of this final rule. Furthermore, the Board notes that natural person federal credit unions do not currently have the authority to enter into commodity contracts and that corporate credit unions may not enter into commodity contracts unless specifically authorized to engage in commodity contracts under their expanded authorities. See 12 CFR part 703 and 12 CFR part 704, Appendix B, Part IV.

## **REGULATORY PROCEDURES**

### Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under one million dollars in assets). The Board believes it unlikely that any small federally-insured credit unions engage in swaps. Accordingly, the Board believes that the final rule would not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

### Paperwork Reduction Act

NCUA has determined that this final rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

#### Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

#### The Treasury and General Government Appropriations Act, 1999 - - Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

#### Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) provides generally for congressional review of agency rules. A reporting requirement is

triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. NCUA has recommended to The Office of Management and Budget that it determine that this final rule is not a major rule, and is awaiting its determination.

#### Agency Regulatory Goal

NCUA's goal is clear, understandable regulations that impose minimal regulatory burden. NCUA requested comment on whether the proposed rule met this standard. No commenters addressed the issue.

#### **List of Subjects in 12 CFR part 709**

Credit unions, Liquidations.

By the National Credit Union Administration Board on May 22, 2003.

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Becky Baker

Secretary of the Board

Accordingly, NCUA amends 12 CFR part 709 as follows:

**PART 709 - - INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND  
ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED  
CREDIT UNIONS IN LIQUIDATION**

1. The authority citation for part 709 continues to read as follows:

**AUTHORITY:** 12 U.S.C. 1757, 12 U.S.C. 1766, 12 U.S.C. 1767, 12 U.S.C.  
1786(h), 12 U.S.C. 1787, 12 U.S.C. 1788, 12 U.S.C. 1789, 12 U.S.C. 1789a.

2. Add §709.13 to read as follows:

**§709.13 Treatment of swap agreements in liquidation or conservatorship.**

The Board has determined that a swap agreement, as defined in the Federal Deposit Insurance Act at 12 U.S.C. 1821(e)(8)(D)(vi), is a qualified financial contract for purposes of the special treatment for qualified financial contracts provided in 12 U.S.C. 1787(c). Any master agreement for any swap agreement, together with all supplements to such master agreement, will be treated as one swap agreement.